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Supreme Court, U.S.
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No. 01-1176

In The

Supreme Court of the United States

ERIC CLARK,
in His Capacity as Secretary of
State for the State of Mississippi,

Petitioner,

v.

J. RANDOLPH LIPSCOMB, on Behalf of Himself and All Others Similarly Situated; MAYOR, CITY OF COLUMBUS; CITY COUNCIL OF THE CITY OF COLUMBUS, MISSISSIPPI; & THE COLUMBUS MUNICIPAL SEPARATE SCHOOL DISTRICT,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Should the Petition for Writ of Certiorari be denied when two of the questions presented were not raised below and the third was expressly waived?

2. Have the Columbus leaseholders suffered injury in fact when their land titles have been disparaged, they cannot obtain financing, and the value of leaseholds has dropped since the Secretary's pronouncement that the leases were invalid?

3. Does the Eleventh Amendment sovereign immunity doctrine set forth in *Idaho v. Coeur d'Alene Tribe* apply where the only matter in question is the rental amount in a lease, the state itself is not a party to the leases, and there is no challenge to the sovereign's ability to exercise, tax, police, and regulate activities on the land in question?

4. Can a prohibition on donation of state land violate the Contracts Clause when employed by the state to invalidate a pre-existing lease of state land?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by this court's Rule 24(b) and Rule 29.1.

1. Eric Clark, in his capacity as Secretary of State for the State of Mississippi, Defendant/Petitioner;

2. J. Randolph Lipscomb, on behalf of himself and all others similarly situated; Mayor and City Council of the City of Columbus, Mississippi as successors to the Trustees of Franklin Academy, Plaintiff/Respondents;

3. The Columbus Municipal Separate School District, Defendant/Respondent;

4. State of Mississippi, a defendant party to the judgment below but not a petitioner here. *See* Rules of the Supreme Court of the United States, 12.4, 12.6;

5. United States Department of Housing and Urban Development, a defendant party to the judgment below, but neither an appellant below nor a petitioner here.

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Lipscomb v. Columbus Mun. Sep. Sch. Dist., 269 F.3d 494 (5th Cir. 2001)

ADDITIONAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 211 of the Mississippi Constitution of 1890 provides in part "[S]ixteenth Section lands . . . nor shall they be leased . . . within municipalities for a longer term than ninety-nine (99) years. . . . "

1914 Miss. Laws Ch. 462 says "[t]hat the successors in office of the trustees of the Franklin Academy in the city of Columbus, State of Mississippi, be and they are hereby authorized and empowered to execute renewal leases on the then-existing term . . . for the term of 99 years, renewable forever. . . . "

STATEMENT OF THE CASE

INTRODUCTION

It has cost the current leaseholders in the neighborhood of $30 million[1] to acquire the leasehold warranty deeds that are at issue in this case. The Mississippi Secretary of State's object here is to make those deeds valueless.

The leaseholders invested this money because state authorities established the lease terms and they repeatedly declared the validity of the low rental terms of those deeds, set in the early 1800s by public bidding. The attorney general did so in 1884, the Mississippi Supreme Court did so in 1898, *see Street v. City of Columbus*, 23 So.2d 773 (Miss. 1898), and the Mississippi legislature did so in 1914, when it authorized renewal of the leases on their existing terms in 1920.[2]

The development of the city in reliance on these lease terms has produced tax revenues to the school sufficient to create the first public school in Mississippi and to put the modern district into the top 15% of all schools in Mississippi in funding per student.[3]

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[1] That is a minimum present value of the leases. Petn. at 6. It is a reasonable proxy for the cost of the leases to their present owners plus their opportunity cost of not investing elsewhere since the leaseholds were purchased.

[2] *See* Petn. App. at 62a; Act of March 20, 1914, 1914 Miss. Laws Ch. 462; R. 5:1026. The record will be cited here as Volume:page. The leases are for 99-years renewable forever at the original rent. Although unique to Mississippi, the leases are similar to those used to develop Baltimore, MD and, to some extent, Washington, D.C. *See Camp v. Boyd*, 229 U.S. 530 (1913) (Willard property).

[3] App. 29a. See http://www.mde.k12.ms.US/Account/RC2000/4420.PDF

In 1989, however, the Mississippi Secretary of State unilaterally declared that these leases, which date back to 1821, were invalid because of § 95 of the Mississippi Constitution of 1890. He proposed a new scheme of rents which would destroy the leaseholders' $30 million in investment by charging increased rentals on the property.

All the actual parties to the leases oppose the Secretary of State. This includes not only the lessor, the Mayor and City Council of Columbus, as Successor to the Trustees of Franklin Academy; and the lessees, the leaseholder class; but also the beneficiary, the Columbus Municipal Separate School District. This may be because the Secretary wants to use the additional money to lower school taxes as opposed to increasing school funding.

The Fifth Circuit properly used the Contracts Clause to put a stop to the Secretary's 177 years-after-the-fact political shenanigans.

FACTS

The Fifth Circuit opinions found in Appendices A and B provide a sufficient Statement of Facts for these cases. The leaseholders accept as generally accurate the "Background" and "Proceedings Below" sections in the Petition except as follows:

1. The leasehold warranty deeds in issue here return a rent established by public auction in the 19th century. App. 36a. There is no suggestion in the historical record that these were "sweetheart deals." Petn. at 4.

2. The lessees pay property taxes on the leaseholds as if they owned them. App. 29a.

3. There is no record evidence of the settlement attempts described in Petn. at 7-8. Also, a party cannot use settlement discussions to aid its case on liability. *See* Fed. R. Evid. 408. Petn. at 7-8.

REASONS FOR DENYING THE WRIT

1. This court should not grant certiorari to consider issues that either were not raised or were waived below.

This Court has said it "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987). This is particularly true where the lower court did not pass on the question, and the respondent objects to its consideration in this Court. In federal appeals such as this one, preservation of error in the lower court is not a jurisdictional bar to review. It is, however, a prudential ground for denying certiorari. When the issue was neither raised nor addressed below, and so the Court of Appeals did not address it, there can be no express "conflict" with any other court on that issue.

Here two of the questions presented were not raised below and a third one was waived.

First, the petition admits that the standing question was not raised below. Petn. at 12 n.29. While standing is jurisdictional and may be raised at any time, to allow petitioner to do so at this late date would be unfairly prejudicial to the leaseholders who, if the issue of particularized standing had been raised in the district court,

could have provided additional proof of particularized injury if someone had thought that was necessary.[4]

Secondly, the Attorney General on behalf of the petitioner expressly waived Eleventh Amendment immunity in the district court. In fact, when the plaintiffs, out of an abundance of caution, affirmatively raised the issue and showed that the Secretary of State was a proper defendant, the petitioners moved for summary judgment seeking affirmative relief in federal court and told the district court:

> [The petitioner believes it is] in the public interest of all taxpayers of the state to fully and finally adjudicate the question of the validity of these leases held by the Plaintiff and Plaintiff class in this forum. . . .

Memorandum of Authorities in Support of Defendant Mississippi Secretary of State's Cross-Motion for Summary Judgment, in Motion to Supplement Record on Appeal, Tab D p. 2.

The state thought the federal forum was an advantage to it – until it lost. That is at the very least a prudential ground for denying review on the Eleventh Amendment question now.

Third, petitioner did not make its "general prohibition" Contracts Clause argument in the Court of Appeals. The argument was not made orally nor can it be found in the Fifth Circuit Brief for Appellants State of Mississippi/ Secretary of State served June 20, 2000. The Table of

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[4] K. Bowman "16th Section landowners hardly 'dancing' amid lawsuit", *The Clarion Ledger*, Oct. 17, 2001, p. 8 (inability to sell or finance sale of Columbus house).

Contents does list a relevant case, *Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983), but the body of the brief makes no reference to that case and no mention of this argument. The leaseholders object to its consideration here.

2. The plaintiff class has suffered "injury in fact."

Even though the standing issue was not raised, the proof in the district court supported that court's finding that the class has suffered injury. It said:

> This attack affected leaseholders in the Columbus Sixteenth Section by diminishing the fair market value of their property and creating a barrier to obtaining financing for the sale of these interests. It is now time to put this matter to rest.

Petn. App. at 62(a). The injury they have suffered is directly analogous to the injury a plaintiff in a common law cloud on title or slander of title suit would suffer. Because "threatened reduction in property values of land neighboring . . . power plants" can sometimes confer standing, *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 73 (1978), actual injury to property values should certainly confer standing.

The fact that the respondents did not sue petitioner for damages in federal court certainly does not mean that the respondents have no damages.

In fact, if the issue had been raised below, class representative Randolph Lipscomb would have been able to prove that, while he does not intend to "sell or lease" his property in the near future, Petn. at 10, his inability to use it for financing has had an effect on his ability to

obtain the $100,000 or more he has borrowed to pay some of the fees and expenses in this lawsuit. As it is, the record does attest that, on two occasions, homeowners were prevented from selling or financing sales of their houses because this controversy blocked them from obtaining replacements for leases that were of record but had been lost.[5]

This case is wholly unlike *Warth v. Selden*, 422 U.S. 490, 505, 516 (1975). There none of the plaintiffs owned land in the city they sued and none had asked the city for a building permit. Here the leaseholders all hold 16th Section leases and are directly injured by the Secretary's actions. Moreover, it cannot be disputed that some of the 1484 leasehold warranty deeds in the class have been sold by class members in the 12 years since the Secretary publicly denounced the deeds and unilaterally declared them invalid.

There is no conflict with this Court's decisions[6] and the Petition does not claim that there is a conflict among the Courts of Appeals on these issues.

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[5] Plaintiffs' Appendix of Affidavits and Exhibits, Ex. R (Affidavit of Dewitt Hicks).

[6] *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (environmental group in United States did not have standing to sue for loss of endangered species overseas); *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) (no likelihood shown that plaintiff would be subjected to choke-hold in the future); *Golden v. Zwickler*, 394 U.S. 103 (1969) (wholly conjectural that plaintiff might be prosecuted again for distributing handbills).

3. There is no conflict concerning the application of *Idaho v. Coeur D'Alene* to leasehold disputes.

The Fifth Circuit ruled that it did not have to consider the Eleventh Amendment waiver argument because the suit is one, in effect, to enjoin a state official, i.e., the Secretary of State. Petn. App. at 7a. *See Papasan v. Allain*, 478 U.S. 265, 282 n.14 (1986) (Eleventh Amendment no bar to suit against Mississippi Secretary of State in 16th section land dispute).

It is also a suit against the United States Department of Housing and Urban Development, who quit insuring leases in the Columbus 16th Section because of this controversy. Petn. App. at 61a. There is no Eleventh Amendment barrier to a suit against the federal government in federal court.

In addition, the Fifth Circuit found *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261 (1997) easily distinguishable. Petn. App. at 7a-9a. The issue here is rent paid to the local school district, not sovereignty. Like *Elephant Butte Irrigation Dist. of New Mexico v. Dep't of the Interior*, 160 F.3d 602 (10th Cir. 1998), the only question at issue is one concerning rent income from public lands. Petn. at 17 n.52.

Respondents fully admit that the land is subject to all of the normal sovereign powers of the state.

But rent to a local school district is money, not sovereignty. Sovereignty is something that cannot be sold or bargained away. Throughout most of the 19th century,

Mississippi could not only rent 16th section land, it could also sell it or even lose it by adverse possession.[7]

In fact, the money does not even belong to the State. The State is not a party to the leases. The rent does not go to the state treasury. This is a dispute concerning the validity and price of leases that are between the Mayor and City Council of the City of Columbus as successors to the Trustees of Franklin Academy and the respondent leaseholders. The beneficiary is the Columbus Municipal Separate School District. The Secretary of State only has an interest in the case because a statute gives the Secretary the authority to recommend suit against the school district if it does not comply with 16th Section leasing laws.[8] The State itself was a party below but has not petitioned for certiorari.

Further support for this can be found in *Coeur D'Alene Tribe* itself, which relied on *Papasan*, a Mississippi 16th Section land dispute fully adjudicated by the federal courts.[9]

None of the allegedly conflicting cases cited in the Petition had anything to do with the rent price of public land. Nor is there yet any well-defined conflict among the

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[7] *Alabama v. Schmidt*, 232 U.S. 168, 173-74 (1914); *Jones v. Gulf Refining Co.*, 34 So.2d 735 (Miss. 1948) (adverse possession of 16th section land arising out of 1875 tax deed). Even today the land can be sold for industrial development. Miss. Const. of 1890 § 211.

[8] Miss. Code Ann. Section 29-3-9.

[9] *See* 521 U.S. at 277.

Courts of Appeal concerning the applicable test in this context, as opposed to others.[10]

4. This is a proper Contracts Clause case because the state constitutional provision that retroactively impairs the leaseholders' contracts is directed solely at public land grants.

Section 95 of the 1890 Mississippi Constitution applies to one thing and one thing only: the terms of state land contracts. Petn. at 2. It says state land cannot be

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[10] *See McDonald v. Village of Northport*, 164 F.3d 964, 969-971 (6th Cir. 1999) (public access to navigable waters was state sovereignty interest) (alternative holding); *Ellis v. University of Kansas Medical Center*, 163 F.3d 1186, 1198 (10th Cir. 1998) (race discrimination case could go forward).

This Court has already granted certiorari to resolve conflicts in the telephone interconnection agreement cases, two of which the Secretary cites, *MCI Telecommunication Corporation v. Bell Atlantic-Pennsylvania*, 271 F.3d 491 (3rd Cir. 2001), and *MCI Telecom. Corp. v. Illinois Bell Telephone Co.*, 222 F.3d 323 (7th Cir. 2000). The cases now pending in this Court are *Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 70 U.S.L.W. 3047 (No. 001531, July 17, 2001) and *Mathias v. WorldCom Technologies*, 70 U.S.L.W. 3046 (No. 00-878, July 17, 2001).

Those cases involve a federal statute, the Telecommunications Act of 1996, and the Eleventh Amendment concerns arise out of the nature of the federally-proscribed remedial scheme, whether an ongoing violation of federal law has been shown, whether the state defendants are necessary parties, and whether their quasi-judicial status is significant. *See Bell Atlantic Maryland, Inc. v. MCI WorldCom*, 240 F.3d 279, 295-98 (4th Cir. 2001), *cert. granted sub nom. Verizon Maryland, Inc. v. Public Service Comm'n of Maryland*, 70 U.S.L.W. 3047 (No. 001531, July 17, 2001). None of those factors are at issue here.

"donated."[11] The leasehold warranty deeds in issue here are lease contracts for land the state told the City to lease long before the 1890 Constitution was adopted.

The prohibition applies to all public land donations and to nothing but public land donations. This case is thus unlike *Exxon Corporation v. Eagerton*, 462 U.S. 176 (1983), in which the prohibition against "pass-through" applied to oil and gas producers who did not have conflicting contracts. *Id.* The effect on the pass-through contracts was "incidental" to the law's main purpose. Here the effect is only on those who receive "donated" land from the State. The effect on the leaseholders' contracts, if the provision were applied, would be central to the law's main purpose, i.e., to prevent donation of public land.

Moreover, the contracts in issue here, unlike the contracts in *Exxon*, are contracts with an agent of the state. This Court in *Exxon* found it significant that the contracts in that case were not state contracts. *See* 462 U.S. at 192 n.13. The Contracts Clause protection has particular force when a state uses legislation to attempt to get out of its own bargain. *Id.*, citing *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25-28 (1977). So there is no conflict between this case and *Exxon*.

Finally, the petitioners incorrectly contend that the leaseholds are not impaired by the 1890 Constitution but

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[11] A companion provision, Miss. Const. of 1890 § 211, limits the time period for leasing 16th Section lands and would also impair the leases in issue here but for the protection of the Contracts Clause.

by a 1990 court decision that construed the 1890 Constitution. They mistakenly rely on a case, *Frazier v. Lowndes County, Miss., Board of Education*, 710 F.2d 1097 (5th Cir. 1983), in which a decision construing the 1890 Constitution did not raise a Contracts Clause question because the lease in issue was a post-1890 lease. Here the leases predate 1890. As the Fifth Circuit said in 1998:

> [In *Frazier*] . . . [w]e only found the Contracts Clause inapplicable . . . because the legal authority upon which the school district relied in challenging the leases predated those leases. . . . Here, on the other hand, the school district allegedly challenges the Columbus leases under the authority of the Mississippi Constitution of 1890, which postdated them – a potential Contracts Clause violation.

See Lipscomb v. Columbus Mun. Sep. Sch. Dist., 145 F.3d 238, 240-242 (5th Cir. 1998); Petn. App. at 42a. *See also* Petn. App. at 12a.

CONCLUSION

There is no conflict. There is no conflict with the decisions of this Court nor is there a conflict with the decisions of the Courts of Appeals. The questions presented were either not raised in the court below or were expressly waived. None of them has merit. This Court should deny the Petition.

FOR THESE REASONS, Respondents pray that the Petition for Certiorari will be denied.

Respectfully submitted,

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